DUSUNKU SDN BHD v. TENAGA NASIONAL BHD

HIGH COURT MALAYA, ALOR SETAR
GHAZALI CHA J
[ORIGINATING SUMMONS NO: KA-22NCVC-04-01-2017]
10 SEPTEMBER 2020

LAND LAW: *Wayleave – Compensation – Variation of amount of compensation upon appeal to Majlis Mesyuarat Kerajaan Negeri ('MMK') – Whether decision of MMK allowing appeal ultra vires – Whether decision binding on parties – Whether TNB breached statutory duty in failing to settle payment – Whether challenge against MMK's decision involved public law elements – Whether to challenge by way of judicial review and not collateral attack – Electricity Supply Act 1990, ss. 11(1), (6), (7) & 16(2)*

On or around 1998, a 'wayleave' procedure was commenced by the defendant on the plaintiff's land ('affected land') pursuant to s. 11(1) of the Electricity Supply Act 1990 ('ESA'). The plaintiff objected to the procedure and as a result, an enquiry was conducted under s. 11(6) of the ESA by the Pendang District Land Administrator ('LA'). Upon satisfaction of the enquiry, the LA ordered the wayleave in favour of the defendant by virtue of s. 11(7) of the ESA followed by the compensation for the sum of RM188,672.40 to be paid to the plaintiff. Dissatisfied, the plaintiff appealed to the Majlis Mesyuarat Kerajaan Negeri Kedah ('MMK') under s. 16(2) of the ESA. The MMK decided in favour of the plaintiff by increasing the compensation sum initially awarded by the LA to the sum of RM399,312. The plaintiff claimed that the defendant had not settled the sum of RM399,312 and thus failed to comply with the decision of the MMK. Hence, the instant action by the plaintiff. The issues raised for the determination of the court were: (i) whether the decision of the MMK was *ultra vires* and hence, not binding on the parties; (ii) whether the defendant had breached its statutory obligation/duty to pay the sum of RM399,312 to the plaintiff; (iii) whether the defendant could challenge the plaintiff's claim by way of collateral attack; and (iv) whether the plaintiff's claim against the defendant was barred by s. 6 of the Limitation Act 1953.

Held (allowing plaintiff's claim with costs and dismissing the defendant's counterclaim):

(1) As State Governments are led by Chief Ministers, who are State Assembly Members from the majority party in the State Legislative Assembly and MMK was led by the Chief Minister, the MMK is a State Authority. When Pengarah Tanah dan Galian was ordered by the MMK to review the award of the LA, such decision went through the full and proper procedure such as the Exco committee meeting. Hence, the decision by the MMK to allow the plaintiff's appeal was not *ultra vires*

A and was binding on the parties as the LA of Pendang was also one of the Government agencies led by the Chief Minister, the head of MMK. (paras 22, 24 & 26)

(2) Since the decision was not *ultra vires*, the defendant invariably owed its statutory duty to pay the awarded amount to the plaintiff. By admitting to be aware of the decision and that it had not been reversed or varied by the court or the Chief Minister, the defendant had breached its duty to settle the statutory payment to the plaintiff. (paras 27 & 29)

(3) The defendant's challenge against the MMK's decision involved public law elements because (i) it involved the interpretation of 'State Authority' and the issue of whether the MMK was acting within its jurisdiction in deciding on such matter; (ii) the decision impacted the other owners on the land and hence, it involved public interest. The underlying purpose and intention of the defendant's complaint against the plaintiff's claim was to challenge the principle of natural justice, impropriety and procedural fairness. The MMK's decision was legal and proper and therefore, the recourse for the defendant was to challenge it by way of judicial review and not collateral attack. (paras 40, 43 & 48)

(4) The plaintiff's action was not barred by any limitation period under s. 6(1)(d) of the Limitation Act as the defendant was under its statutory obligation to make the payment to the plaintiff. (para 63)

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

F *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC* ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Datuk Bandar Majlis Bandaraya Shah Alam & Anor v. Yusuf Awang & Ors [2007] 4 CLJ 253 CA ***(refd)***

Ee Chong Pang & Ors v. The Land Administrator Of The District Of Alor Gajah & Anor [2013] 3 CLJ 649 CA ***(refd)***

G *Lindsay Petroleum Co v. Hurd [1874] LR PC 221* ***(refd)***

Smith v. East Eiloe Rural District Council & Ors [1956] AC 736 ***(refd)***

Telic Farm Sdn Bhd v. Majlis Bandaraya Melaka Bersejarah [2008] 1 LNS 65 HC ***(refd)***

Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram [2001] 3 CLJ 967 HC ***(refd)***

Legislation referred to:

H Electricity Supply Act 1990, ss. 11(1), (6), (7), 16(2)

Limitation Act 1953, s. 6(1)(d)

Rules of Court 2012, O. 52

Other source(s) referred to:

Wade & Forsyth, *Administrative Law*, 9th edn, pp 301-302

I *For the plaintiff - CC Chang; M/s Syarikat Ng & Anuar*

For the defendant - Alvin John, Wong Chin Eng & Nadia Falisha Azlan Shah Aziz; M/s Alvin John & Partners

Reported by S Barathi

JUDGMENT

Ghazali Cha J:

[1] This claim is filed by the plaintiff against the defendant *vis-à-vis* the compensation awarded by the Majlis Mesyuarat Kerajaan Negeri Kedah ("MMK") to the plaintiff for "wayleave" on the plaintiff's land.

[2] The case was tried by way of full hearing. The plaintiff and defendant had called one witness respectively. The plaintiff's witness is identified as Low Meng Chung being the plaintiff's manager (PW1) whereas the defendant's witness was Azren bin Othman @ Abdullah, head of land management and grid department, Mr Azren bin Othman @ Abdullah (DW1).

[3] After hearing from the witnesses and their solicitors' submission at great length, I hereby deliver my decision below.

Salient Facts

[4] It is necessary to appreciate the salient facts leading to the plaintiff's claim in this action.

[5] On or around 1998, a "wayleave" procedure was commenced by the defendant on the plaintiff's land identified as GRN 10323, Lot 6634 Mukim Ayer Puteh Daerah Pendang Kedah ("the affected land") pursuant to s. 11(1) of the Electricity Supply Act ("ESA 1990").

[6] The plaintiff objected to the procedure and as a result of its objection, an enquiry was conducted under s. 11(6) of the ESA 1990 by the Pendang District Land Administrator (hereinafter referred to as the "Land Administrator").

[7] Upon the satisfaction of the enquiry, the Land Administrator ordered the wayleave in favour of the defendant by virtue of s. 11(7) ESA 1990 followed by the compensation for the sum of RM188,672.40 to be paid to the plaintiff.

[8] The plaintiff, being dissatisfied with the compensation sum, has appealed to the MMK under s. 16(2) ESA 1990. MMK had decided in favour of the plaintiff by varying the compensation sum initially awarded by the Land Administrator and increased a further sum of RM399,312 to be paid to the plaintiff by the defendant.

[9] The plaintiff then claimed that the defendant has failed to comply with the decision of the MMK by settling the sum of RM399,312 to the plaintiff. Hence, the instant action.

[10] This forms the crux of the instant action.

A **The Core Issues To Be Tried**

[11] To ease reference, I gather that the main issues deduced from the salient facts which deserve discussion and consideration are as follows:

(i) Whether the decision awarded by the MMK is *ultra vires* and hence not
B binding on parties;

(ii) Whether the defendant has breached its statutory obligation/duty to pay the sum of RM399,312 to the plaintiff;

(iii) Whether the defendant can challenge the plaintiff's claim by way of
C collateral attack;

(iv) Whether the plaintiff's claim against the defendant is barred by s. 6 of the Limitation Act 1953;

[12] I shall proceed to discuss the issues accordingly at great length herein
D below.

Issue (i): Whether The Decision Made By PTD Pendang Is Ultra Vires

[13] I shall firstly discuss this issue (i) as I believe that the rest of the issues shall follow suit.

[14] The plaintiff submitted that the claim is legit as the claim is awarded
E relied upon s. 11 and s. 16 ESA 1990.

S. 11 Power to enter on land for purposes of construction

(1) Subject to as hereinafter provided, whenever it is necessary so to do for the purpose of installing any system of distribution of electricity under
F this Act, a licensee may lay, place or carry on, under or over any land, other than State land, such posts and other equipment as may be necessary or proper for the purposes of the licensed installation, as the case may be, and may take such other action as may be necessary to render the installation safe and efficient, paying full compensation in accordance with section 16 to all persons interested for any disturbance,
G damage or disability that may be caused thereby and such compensation may include an annual payment for land used for the purpose of the posts or other equipment.

(2) Before entering on any land for the purpose specified in subsection (1), the licensee shall give a notice stating as fully and accurately as possible
H the nature and extent of the acts intended to be done. The notice shall be substantially in the form set out in the First Schedule and the District Land Administrator shall specify a date upon which the State Authority shall inquire into any objection that may have been made as hereinafter provided.

(3) The aforesaid notice shall be given:
I

(a) in the case of alienated land, to the owner or occupier;

(b) in the case of reserved land, to the officer or any other person in charge of the reserved land or, in the absence of any such officer or person, to the District Land Administrator,

and may be sent by registered post or be left at the usual or last known place of abodes of the person to whom it is to be given or served by the licensee or the District Land Administrator at the expense of the licensee, either in the manner herein before provided or in the manner provided for the service of notices by any written law relating to land in force in the State where the land is situated.

(4) Any of the persons mentioned in subsection (3) may, within fourteen days of the receipt of the notice therein referred to, lodge an objection to the intended acts of the licensee. The objection may be made to the District Land Administrator, either verbally or in writing, and the District Land Administrator shall give notice of the objection to the State Authority and to the licensee.

(5) If no objection is lodged within the time limited for that purpose by subsection (4), the licensee may forthwith enter on the land and do all or any of the acts specified in the notice given under subsection (2).

(6) If an objection is lodged and is not withdrawn before the date fixed for the hearing thereof, the District Land Administrator shall hold an enquiry, giving all parties an opportunity to be heard.

(7) Upon the conclusion of the enquiry the District Land Administrator may either unconditionally or subject to such terms, conditions and stipulations as he thinks fit, make an order authorising or prohibiting any of the acts mentioned in the notice given under subsection (2). The order shall be substantially in the form set out in the Second Schedule:

Provided that any party who is dissatisfied with the District Land Administrator's order may within twenty-one days after the order appeal against such an order to the State Authority which may then uphold, set aside or vary the order upon such terms, conditions and stipulations as it thinks fit.

(8) The State Authority may, if it thinks fit, *in lieu* of making an order under subsection (7), direct the acquisition of any land or part of any land included in a notice given under subsection (2).

(9) The decision of the State Authority under this section shall be final.

(10) Notwithstanding any written law relating to land matters, the Registrar:

(a) upon the production to him of the notice issued by the licensee under subsection (2) together with the statement by the District Land Administrator that no objection had been lodged by any of the persons mentioned in subsection (3); or

(b) upon the production to him of the original order made under subsection (7) and upon the deposit with him of a certified copy of such order,

A shall cause to be made on the register document of title relating to the land affected by the notice or order as the case may be, a note of the existence of the rights under such notice or order.

S. 16 Compensation

B (1) The amount of compensation, if any, payable under section 11 or 13 shall be assessed by the District Land Administrator after such enquiry as he shall deem sufficient. The assessment shall be substantially in the form set out in the Third Schedule:

> Provided further that no compensation shall be payable by the licensee in respect of any tree within fifty feet of the centre line
C of any road constructed or maintained by the State Government or by any local authority unless it is proved that the tree was in existence prior to the construction of the road.

(2) Any person aggrieved with the District Land Administrator's assessment may within twenty-one days after the assessment appeal to
D the State Authority whose decision shall be final.

[15] The defendant, on the other hand, contended that any appeal must be made to the State Authority. As the appeal by the plaintiff was addressed to the wrong party as MMK is not a State Authority, therefore, the decision is *ultra vires* and not binding on parties.

E **[16]** The defendant in its submission, had submitted that the State Authority ought to be State Executive Council (State EXCO) instead of PTD or MMK. Accordingly, the PTD Pendang is "*functus officio*" and is not a competent authority under s. 16 ESA 1990 to receive any form of appeal against its own decision from the plaintiff.

F **[17]** The defendant referred to the case of *Ee Chong Pang & Ors v. The Land Administrator Of The District Of Alor Gajah & Anor* [2013] 3 CLJ 649 which held that:

> [74] The draft judgment of my learned brother accepts in entirety the
G appellants' contention that Form A was never issued and that Form E was never served. However, my learned brother has gone on to hold that issuance of Form A is not mandatory despite the imperative language of s. 4(1). With respect, this approach disregards well settled principles of statutory construction. We are dealing with a statute which is aimed at the prevention of arbitrary escheatment of proprietary rights, the
H protection of which the supreme law of the Federation guarantees as a fundamental right. To read a mandatory provision in such a statute in generous and favourable manner towards those whose duty is to ensure their due observance is to condone and promote maladministration in a manner so important as the deprivation of property. It is a message from the judicial arm of the Government to bureaucrats that due compliance
I with mandatory provisions of the Act will produce no consequences for

them. I am therefore unable in the case of compelling authority as I have found and cited in this judgment to accept an *ipse dixit* on no authority that compliance with s. 4(1) is not mandatory.

[18] The plaintiff, on the other hand, challenged the defendant's argument claiming that MMK is the State Authority. Besides, the plaintiff submitted that this issue is not novel as it had been dealt with under O. 14A (encl. 12).

[19] I pause here and digress to encl. 12 which was previously filed by the defendant before the trial took place. One of the issues raised by the defendant in encl. 12 is whether the decision of MKK is *ultra vires*. The plaintiff referred to p. 5 of my grounds judgment for encl. 12 as follows:

> Mengenai sama ada Majlis Mesyuarat Kerajaan Negeri Kedah telah *ultra vires* di dalam membuat keputusan memberikan pampasan tambahan kepada Plaintif. Saya merujuk kepada s. 16(2) Akta Bekalan Elektrik 1990 yang mana jelas mengatakan pihak yang terkilan dengan taksiran Pentadbir Tanah Daerah (PTD) boleh merayu kepada Pihak Berkuasa Negeri dalam masa 21 hari selepas taksiran dibuat dan keputusan Pihak Berkuasa Negeri itu adalah muktamad.
>
> Tidak timbul isu berkenaan dengan *ultra vires* ataupun tidak. Ini kerana Pihak Berkuasa Negeri telahpun bersidang dan memutuskan seperti kehendak sek 16(2) Akta Bekalan Elektrik 1990. Begitu juga sepertimana yang saya putuskan di atas: Plaintif tidak merayu kepada kepada Pentadbir Tanah Daerah (PTD) Pendang, akan tetapi mengemukakan cadangan supaya taksiran berkenaan di ubah; khusus supaya kerugian yang dialami oleh Plaintif, mengenai susut nilai tanah tersebut tidak terlalu memudaratkan.

[20] For completeness, I refer to the Interpretation Acts 1948 and 1967 which has defined State Authority as below:

> "State Authority" means the Ruler or Yang di-Pertua Negeri of a State and includes, in Negeri Sembilan, the Yang di-Pertuan Besar acting on behalf of himself and the Ruling Chiefs

[21] The interpretation was referred to in the case of *Datuk Bandar Majlis Bandaraya Shah Alam & Anor v. Yusuf Awang & Ors* [2007] 4 CLJ 253.

[22] As State Governments are led by Chief Ministers (Menteri Besar in Malay), who are State Assembly Members from the majority party in the Dewan Undangan Negeri and MMK is led by the Chief Minister, this means that MMK is the State Authority.

[23] With respect, I find that I am unable to concede with the defendant's argument on this issue that MMK's decision is *ultra vires* for the reasons mentioned above.

[24] It must be noted that when PTG was ordered by MMK to review the award of the Land Administrator to the plaintiff, such decision went through the full and proper procedure such as EXCO Committee meeting. Unless the defendant can challenge otherwise through the trial, I am satisfied that the plaintiff had satisfied s. 16 of the ESA 1990.

[25] Besides, as there is no appeal to encl. 12 filed by the defendant, I believe that my decision on encl. 12 shall be binding and followed accordingly in the instant action.

[26] That said, I hold that the decision by MMK to allow the plaintiff's appeal is not *ultra vires* and therefore binding on parties as PTD Pendang is also one of the government agencies led by the YAB Menteri Besar who is also the head of MMK.

Issue (ii): Whether The Defendant Breached Its Statutory Payment To The Plaintiff?

[27] Since the decision is not *ultra vires*, the defendant invariably owes its statutory duty to pay the awarded amount to the plaintiff.

[28] During the trial, the defendant has admitted that it is made aware of the decision.

S: Adakah Encik bersetuju dengan saya penerima surat ini, adakah Encik setuju surat rayuan ini telah dibuat kepada satu agensi kerajaan negeri iaitu pentadbir tanah Daerah Pendang, setuju?

J: Agensi kerajaan negeri, ya.

S: Adakah pada setiap masa itu TNB tahu berkenaan tentang rayuan (Plaintif) tersebut?

J: Tidak tahu

S. Bila TNB tahu?

J: lebih kurang September tahun 2001.

S: Tadi, Encik kata bulan September TNB tahu rayuan tersebut, betul?

J: Ya

S: Apakah langkah-langkah yang dibuat oleh TNB selepas mengetahui rayuan tersebut?

J: TNB membuat rayuan kepada Menteri Besar.

S. Bila rayuan itu dibuat?

J: 20.09.2001.

[29] Since the defendant is aware of the decision and it has not been reversed or varied by the court or Menteri Besar, I am satisfied that the defendant has breached its duty to settle the statutory payment to the plaintiff.

Issue (iii): Whether The Defendant Can Challenge The Claim By Way Of Collateral Attack?

[30] When the defendant was made aware of the decision in or around 2001, the only step taken by the defendant to challenge the decision was to complain or appeal to the Menteri Besar. It was admitted that no action was taken to the court to challenge the said decision save for a letter to the YAB Menteri Besar. Hitherto, there is no reply whatsoever.

[31] It is the plaintiff's case that the defendant had failed to take any positive action to challenge the decision. Hence laches should apply.

[32] During the trial, it was mentioned and admitted by DW1 that the defendant is still awaiting the reply from the Menteri Besar.

J: Ya, TNB menunggu.

S: Selepas itu tiada apa-apa lagi yang berlaku?

J: Ya, tiada

S: Setuju dengan saya kalau selepas itu tiada apa yang berubah, TNB perlu ambil tindakan untuk datang ke Mahkamah untuk mencabar keesahan keputusan PBN pada Tarikh 25.4.2001, setuju

J: tidak setuju

S: Tak payah cabar, tunggu lagi?

J: TNB telah buat tindakan

S: Sehingga hari ini masih menunggu? Jawab saya, sehingga hari ini masih menunggu?

J: Ya.

[33] The plaintiff had this to say. The plaintiff had argued that the proper recourse for the defendant is to file a leave for judicial review in the court to quash the decision particularly when the defendant claimed that the decision was decided in excess of MMK's jurisdiction.

[34] The plaintiff relied on the case of *Telic Farm Sdn Bhd v. Majlis Bandaraya Melaka Bersejarah* [2008] 1 LNS 65; [2008] 5 MLJ 452 which provides, I summarised, that any action to challenge the decision of a public authority must be taken by way of judicial review by virtue of O. 52 Rules of Court 2012.

[35] The procedure to file the judicial review was however provided for by the Federal Court in the case of *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865; [2010] 3 MLJ 145. It was held that:

> Not every decision made by an authoritative body is suitable for judicial review. There must be sufficient public law elements in the decision made. In the instant case, there were clearly elements of public law present. The

A appellant was a public officer subject to the Public Officers (Conduct and Discipline) Regulations 1993 ('the Regulations'). He had been dismissed under a statutory law – the Regulations – by a body which had acted within the scope of such statutory power. Although the decision to dismiss the appellant involved the dismissal of an employee, just like a master dismissing his servant – which constituted a private law matter-the B fact that there were statutory conditions and restrictions imposed by the Regulations on the conduct and dismissal of the appellant underpinned the public law element in the instant case. The instant case was thus suitable for judicial review.

[36] A different view is adopted in another Federal Court case of *Badiaddin* C *Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 which is relied on by the defendant. It held that:

As Abdoolcader J observed when delivering the judgment of the former Federal Court in *Eu Finance Berhad v. Lim Yoke Foo* [1982] 1 LNS 21; [1982] 2 MLJ 37, 39

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The general rule is that where there an order is a nullity, an appeal is somewhat useless as despite any decision or appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon – in other words, it is subject to collateral attack. In E collateral proceedings the court may declare an act that purports to bind to be non-existent.

In *Harkness v. Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729, Lord Diplock LJ (now a Law Lord) said (at p. 736) that "it has been long laid down where an order is a nullity, the person whom the order purports to F affect has the option either of ignoring it or of going to the court and asking for it to be set aside".

[37] I am guided by two long good standing principles decided in these two Federal Court cases. So to decide whether the defendant ought to challenge the decision by way of either judicial review or collateral attack, it is in my view that it depends on the nature and substance of the decision by MMK. G

[38] In the defendant's submission, one of the complaints about the decision was that the MMK's decision is illegal as MMK acted in excess of its jurisdiction to increase the compensation in favour of the plaintiff. In short, the defendant pleaded that MMK is not the State Authority.

H **[39]** The plaintiff, on the contrary, argued that MMK is the State Authority as it is led and head by the Menteri Besar and therefore, it is within its jurisdiction to award the compensation to the plaintiff.

[40] Besides, the next question we must consider is if this involves any public law element. To me, the answer seems to be positive. This is because I firstly, it involves the interpretation of the "State Authority" and the issue

of whether MMK is acting within its jurisdiction in deciding on such matter. Secondly, this decision impacts on the other owners on the land hence it involves public interest.

[41] From the defendant's submission, it also complained on the process of PTD in arriving at its decision. The plaintiff contended that the hearing was conducted by the Land Administrator whereas when the appeal is addressed to PTD and MMK, the decision-making process would be based on the minutes and representation letter by the plaintiff. Hence, the defendant argued that it was not given a fair chance to hear its appeal.

[42] After considering two diversified views, I am satisfied that the proper action ought to be taken by the defendant should be by way of judicial review and not by collateral attack.

[43] It is noteworthy the underlying purpose and intention of the defendant's complaint against the plaintiff's claim is to challenge the principle of natural justice, impropriety and procedural fairness.

[44] From the testimony given by DW1, the only action thus far taken by the defendant was a letter addressed to the Menteri Besar and it is still awaiting the reply.

[45] Unless the defendant can adduce clear evidence to challenge the jurisdiction of MMK that it has acted in excess of its jurisdiction in increasing the compensation, otherwise I agree with the plaintiff that judicial review is the proper action to be taken to resist the plaintiff's claim.

[46] I agree with the plaintiff's submission that an act, omission or decision of a public authority maker is only invalid if any of the conditions has occurred:

(i) There must be proceedings properly brought, that is to say proceedings untainted with procedural infirmity;

(ii) Those proceedings must be brought by a person having *locus standi*;

(iii) The applicant must seek proper remedy; and

(iv) The decision of act, omission or decision must be quashed, set aside or declared void by a court of competent jurisdiction (see, *Administrative Law* by Wade & Forsyth (9th edn) at pp. 301-302).

[47] I refer to the case of *Smith v. East Eiloe Rural District Council & Ors* [1956] AC 736 which correctly held that:

> An order, even if not made in good faith, is still an act of capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.

[48] On this premise, the option available to the defendant is limited. As I am satisfied that MMK's decision is legal and proper, the recourse for the defendant is to challenge it by way of judicial review and not collateral attack.

Issue (iv): Whether The Plaintiff's Claim Is Barred By Section 6(1)(d) Limitation Act 1953

[49] For completeness, I shall address one of the major contentions raised by the defendant in resisting the plaintiff's claim – s. 6(1)(d) of the Limitation Act 1953.

[50] The defendant claimed that as the decision was granted in or around 2011, the plaintiff is now barred by s. 6(1)(d) Limitation Act 1953.

[51] Section 6(1)(d) of the Limitation Act 1953 provides that:

> 6. (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date which the cause of action accrued, that is to say:
>
> (a) actions founded on a contract or on tort;
>
> (b) actions to enforce a recognisance;
>
> (c) actions to enforce an award;
>
> (d) **actions to recover any sum recoverable by virtue of any written law other than penalty or forfeiture**

[52] Before we proceed to discuss the applicability of s. 6(1)(d) to our instant action, it is noteworthy that the defendant also pleaded its defence by relying on the case of *Ismail Abdullah v. Tenaga Nasional Berhad* which facts are analogous to the instant action.

[53] In *Ismail Abdullah* case, the Deputy Registrar of High Court allowed the summary judgment filed by the Ismail Abdullah. The defendant, being aggrieved with the decision, appealed to the High Court Judge in Chamber who later allowed the defendant's appeal. Ismail appealed to the Court of Appeal which later allowed Ismail's appeal. The defendant appealed to the Federal Court.

[54] In the Federal Court, the main issue to be determined can be found in the relevant passage of the judgment:

> It is also clear from the section that the cause or matter must have been decided by the High Court in its original jurisdiction. The legal issue to this court may have arisen from the decision of the High Court in the exercise of its jurisdiction or in the Court of Appeal; .... Under the first limb, that decision by the Court of Appeal must however have raised a question of law which is of general principle not previously decided by this Court. If it has been so decided then that decision becomes a binding precedent in which case there is no leave to be given on that question.

> Alternatively, the applicant must show that the decision would be to public question ... what is important is that the decision answering the question would be to the public advantage.

[55] Reading from judgment of *Ismail Abdullah*, the question formed was whether the defendant is precluded from challenging the legality of the decision of the State Authority under s. 16(2) of the ESA 1990. There is no question posed or decided that MMK's decision is illegal or null for want of jurisdiction.

[56] Defendant has also addressed this court that the plaintiff had sat on its right to make its claim against the defendant after the decision made by the MMK. One of the reasons is because the plaintiff wanted to wait for the outcome of *Ismail Abdullah*'s case.

[57] Be that as it may, I am unable to find any relevance of *Ismail Abdullah*'s case to the instant action as the core issues deduced from the *Ismail Abdullah*'s case are different.

[58] Moreover, for the defendant to invoke laches, the defendant must prove that the delay has prejudiced it. See *Lindsay Petroleum Co v. Hurd* [1874] LR PC 221.

[59] Hence, the correct question we must ask ourselves is whether the plaintiff's claim is time-barred by s. 6(1)(d) Limitation Act 1953.

[60] As a matter of fact, this is a question of law that has already been addressed in encl. 12. I refer to paras 2-4 of my judgment for encl. 12:

> Hujah Plaintif/Responden pula had masa tidak boleh dijadikan pembelaan keatas perbuatan perlanggaran kewajipan statutory oleh Defendan (breach of statutory duty/obligation). Menurut Plaintif, Defendan disini mempunyai statutory duty untuk mematuhi keputusan Majlis Mesyuarat Kerajaan Negeri Kedah. Defendan juga menurut Plaintif telah gagal membayar kepada Plaintif pampasan tambahan itu walaupun telah dipohon oleh Plaintif kepada Defendan berkali-kali.
>
> Penemuan Mahkamah mengenai isu ini ialah walaupun Plaintif telah menarikbalik tindakan sibil mereka terhadap mereka tetapi mereka masih berhak untuk menerima pampasan tambahan yang diputuskan oleh Majlis Mesyuarat Kerajaan Negeri Kedah, bagaimanapun keengganan Defendan untuk mematuhi perintah Majlis Mesyuarat Kerajaan Negeri itu telah menyebabkan Plaintif telah diprejudiskan.

[61] As such, I shall not re-address this issue again as insofar this issue is concerned, the merits *vis-a-vis* the issue of limitation is properly dealt with by encl. 12. If party is dissatisfied with the decision of encl. 12, they should appeal against the decision in encl. 12 and to re-canvass this point of law after trial.

A **[62]** The principle of estoppel and *res judicata* shall come into play. See *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189 and *Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram* [2001] 3 CLJ 967; [2001] 1 MLRH 733.

B **[63]** Accordingly, I am satisfied that the plaintiff's action is not barred by any limitation period under s. 6(1)(d) of the Limitation Act 1953 as the defendant is under its statutory obligation to make the payment to the plaintiff.

[64] On account of totality, I therefore allow the plaintiff's claim with cost
C of RM15,000 subject to allocator.

[65] In relation to the defendant's counterclaim, with respect, I find that there is no merit in its counterclaim and counterclaim is therefore dismissed accordingly.

D **[66]** Finally, I thank both parties for their extensive submissions before this court.

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